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International Convention on the Elimination of All Forms of Racial Discrimination

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Committee on the Elimination of Racial Discrimination

Communication No. 50/2012

Opinion adopted by the Committee at its eighty-fourth session, 3 to 21 February 2014

Submitted by:	A.M.M. (not represented by counsel)
Alleged victim:	The petitioner
State party:	Switzerland
Date of communication:	8 January 2012 (initial submission)
Date of present decision:	18 February 2014

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Annex

Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (eighty-fourth session)

concerning

Communication No. 50/2012*

Submitted by:	A.M.M. (not represented by counsel)
Alleged victim:	The petitioner
State party:	Switzerland
Date of communication:	8 January 2012 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 18 February 2014,

Having concluded its consideration of communication No. 50/2012, submitted to the Committee on the Elimination of Racial Discrimination by A.M.M. under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into account all information made available to it by the petitioner, his counsel and the State party,

Adopts the following:

Opinion

1. The author of the communication dated 8 January 2012 is A.M.M., a Somali national born in Mogadishu on 10 December 1968. He claims to be a victim of violations by Switzerland of articles 1 (paras. 1–4), 2 (para. 2), 4 (subpara. (c)), 5 (subparas. (a), (b) and (d) (i) and (iii) to (v)), 6 and 7 of the Convention.[1] The petitioner is not represented by counsel.

* The following members of the Committee participated in the examination of the communication: Mr. Nourredine Amir; Mr. Alexei S. Avtonomov; Mr. Marc Bossuyt; Mr. José Francisco Cali Tzay; Ms. Anastasia Crickley; Ms. Fatimata-Binta Victoire Dah; Mr. Ion Diaconu; Ms. Afiwa-Kindena Hohoueto; Mr. Yong'an Huang; Mr. Anwar Kemal; Mr. Melhem Khalaf; Mr. Gun Kut; Mr. Dilip Lahiri; Mr. Pastor Elías Murillo Martínez; Mr. Carlos Manuel Vázquez and Mr. Yeung Kam John Yeung Sik Yuen.

[1] Switzerland ratified the Convention on 29 November 1994 and made a declaration under article 14 on 19 June 2003.

The facts as submitted by the petitioner

2.1 In 1996, having completed his studies at the Military and Civil Academy in Tripoli and unsuccessfully applied for a residence permit in Libya, the petitioner boarded a plane to return to Somalia via Zurich, Switzerland. Fearing persecution by the majority clans in his country of origin (he felt threatened because he had been sent to Libya by the former Somali government), the petitioner applied for asylum in Switzerland while in transit in Zurich. In response to his asylum application dated 11 August 1997, the petitioner was granted temporary admission on 5 January 1999 by the Federal Office for Refugees (later succeeded by the Federal Office for Migration). The Office considered that the petitioner did not meet the criteria for refugee status as he had not "personally suffered persecution". Even so, having considered the whole file and in view of the political situation in Somalia at the time of the application, the Office for Refugees did not find it reasonable to send him back. Since then, the petitioner has had an "F" permit, which gives him temporary admission status.

2.2 Since 5 January 1999, the petitioner has received a monthly allowance of 387.50 Swiss francs (CHF), which he considers insufficient to meet his needs.[2]

2.3 Apart from a period between 2 May 2000 and 30 September 2002, the petitioner has never managed to find work in Switzerland, despite his Libyan university education and his efforts to improve his qualifications.[3] The contract he signed with his employer in 2000 referred to him as a house boy (*garçon de maison*), although the job consisted in working in a hotel reception and acting as interpreter, mainly for Arab guests. He was paid CHF 1,700 gross per month. After a year, the petitioner told his employer that he could not continue under those conditions. He was told that as a holder of an "F" permit he could not be hired as a receptionist, as positions of that kind were reserved for holders of a residence permit. The employer therefore put in the contract that he was a porter (*tournant de loge*). As this did not suit him, the employer offered him night work so that he could keep up his German classes during the day. The contract referred to him as a night receptionist, part-time and hourly paid. He therefore had no job security. The Federal Office for Migration took 10 per cent of his pay and placed it in a special account.

2.4 To boost his chances of finding more stable employment, the petitioner took steps to obtain vocational training and university education. In 2001 he asked the unemployment benefit office to pay for training in hotel work and said he would be prepared to pay back his unemployment benefit as soon as he could. His application, dated 30 November 2001, was turned down by the Regional Employment Office on the grounds that, although such training would improve his qualifications, it was not necessary in order to find a job as he was already working in the hotel business. By a ruling of 18 June 2003, the Administrative Tribunal of the Canton of Vaud upheld that decision. By a ruling of 2 September 2004, the Federal Insurance Court upheld the cantonal tribunal's decision on the grounds that, with his qualifications, the petitioner should be able to find work in Switzerland and did not need that training to do so.

2.5 One of the many job applications submitted by the petitioner was to the Federal Office for Migration in October 2007 for a post as a translator and minute-taker. As he spoke Somali, Arabic and French, he thought his CV would be of interest. He had an interview and a written test, doing very well in both. An official of the Office informed him that he could not be hired: the Federal Government had refused to take him on the grounds that a person with an "F" permit could not be hired for that position.

[2] This sum is paid by the Migrant Reception Office of the Canton of Vaud if the beneficiary is not in gainful employment. That Office also provides accommodation and pays for health insurance.

[3] The author attended a training course in Germany in 2005 and returned to Switzerland in 2006.

2.6 Finally, in order to obtain work in river boats on the Rhine at Basel, the petitioner contacted the Basel cantonal job-training service, with positive results. However, his request to the Federal Office for Migration to move canton was turned down on 21 September 2005.

2.7 The petitioner also states that, despite the entry into force of the new Foreign Nationals Act on 1 January 2008, "F" permit holders still have to seek the approval of the migration services in order to be able to work. He was informed of this requirement on 12 January 2011.

2.8 The petitioner wished to renew his maritime navigation certificate in other countries (he could not renew it in Switzerland). For that to be possible, the authorities of the State party would need to issue a certificate of temporary admission or a residence permit recognized by neighbouring States. The petitioner was unable to obtain an official letter from the Swiss authorities and was therefore unable to renew his certificate.

2.9 Access to university education is also *very circumscribed* for "F" permit holders. He made several attempts to register at the University of Lausanne but was unsuccessful even though he considered that he met the conditions required. Holders of an "F" permit must have three years' work experience (see University Board Guidelines on requirements for matriculation 2011/12) and, if his internships between 2002 and 2005 were taken into account (he says that Swiss law counts internships as work experience), he would have the required three years. The petitioner refers to an e-mail between the University and the Office for Scholarships of the Canton of Vaud stating that the only reason for rejecting him was the "F" permit. On the other hand, the petitioner did manage to register at the University of Geneva and asked to move from the canton of Vaud to the canton of Geneva. On 9 July 2008 the Federal Office for Migration told him that it was denying his request.

2.10 Despite having lived in Switzerland since 1999, tried many times to find work, and while waiting for work taken internships and attempted to obtain training, the petitioner has still not been given anything other than an "F" permit. In 2001, when he was working full-time in insecure, unfair conditions and asked the Swiss authorities for a residence and work permit ("B" permit), the reply was negative on the grounds that a person needed to have lived in Switzerland for a long time to get one. The letter did not say how long. An acquaintance of the petitioner's who had made a similar application had received a letter informing him of the required period of residence. It was from that person that the petitioner learned that he could apply after five years' residence in Switzerland. He therefore waited the requisite length of time and submitted an application for a permit. On 8 February 2003 he received a letter informing him that his application had been dismissed (*non-entrée en matière*). He requested an official letter so as to be able to appeal to the courts. After several months' wait, he received a letter setting out the grounds on 6 June 2003. His application had been dismissed on the basis of articles 4, 10 (para. 1 (d)), and 16 of the Federal Act on the Residence and Permanent Settlement of Foreign Nationals; and article 13 (f) of the Ordinance Limiting the Number of Foreign Nationals. In a decision of 28 August 2004, the Population Service of the Canton of Vaud also referred to articles 4 and 16, paragraph 1, of the Federal Act on the Residence and Permanent Settlement of Foreign Nationals, and cited a ruling by the Federal Supreme Court (judgement of 21 February 1996, *Ngangu M*), to the effect that federal law could not order a foreign national to be given the right to a residence permit, since that would be incompatible with article 4 of the Federal Act on the Residence and Permanent Settlement of Foreign Nationals.

2.11 In terms of access to health, in January 2008 the petitioner attempted to see a dentist but was unable to obtain the necessary treatment in time because the Migrant Reception Office of the Canton of Vaud did not issue a payment guarantee, an essential document in all dealings with the medical sector that have financial implications.

2.12 Turning to interference by the authorities in his private life, the petitioner claims that officials of the Migrant Reception Office of the Canton of Vaud have entered his home on many occasions since July 2009, opened his letterbox and looked at his correspondence, even going so far as to break open the letterbox when they could not find the key. In addition the petitioner has had several letters asking him to attend courses where he would be taught "Swiss life and customs", for example, or "Living in an apartment", even though he had already been in Switzerland for many years.[4] When he objected to this request, which he considered to be disrespectful to his origins and his sociocultural identity and background, the equivalent of two days' benefit was withheld from his monthly welfare payment. In addition, between 6 June 2001 and 29 June 2004 the petitioner made several requests to leave the country to visit his sick mother in Ethiopia, to no avail.

2.13 On 6 December 2006 the petitioner lodged a complaint with the Federal Commission against Racism in respect of the refusal to issue a residence permit and the discriminatory effects of the "F" permit on the petitioner. On 27 December 2006 the Commission replied that it did not deal with matters relating to residence status at the individual level. It forwarded his complaint to the Federal Commission on Refugees, which on 22 January 2007 rejected it on the grounds that only the cantonal authorities were competent to issue residence permits and to determine whether there had been an error of judgement in a particular case. On 8 September 2009 the petitioner contacted the mediator of the Evangelical Reformed Church of the Canton of Vaud on the same subject and on 3 October 2011 he wrote to the Federal Department of Justice and Police asking them to approach the Federal Office for Migration. These actions came to nothing.

2.14 The petitioner also appealed to the national courts. One of his applications, regarding his request for an identity certificate incorporating a return entry visa, submitted on 1 February 2008 to the Federal Administrative Court, was rejected on 19 February 2008.

2.15 On 26 August 2010, the petitioner lodged a complaint against persons unknown for, among other things, damage to property, after his letterbox was broken into, and on 3 and 17 January 2011 against the Migrant Reception Office of the Canton of Vaud. He accused members of staff of that Office of violation of his privacy insofar as they had wanted to come into his home to obtain technical data, of registering him on courses, of failing to grant his request for a change of social worker and of failing to give him a timely reply in respect of dental treatment. In an order of 2 May 2011, the district prosecutor of Lausanne dismissed the complaint on the grounds that the allegations against the Migrant Reception Office did not amount to a criminal offence and that the complaint for damage to property was time-barred. The prosecutor also rejected his application for legal aid and for free legal counsel.

2.16 On 19 May 2011 the petitioner appealed against the prosecutor's order in the Criminal Appeals Chamber of the Vaud Cantonal Court. In his appeal he complained of invasion of privacy by the Migrant Reception Office, obstruction of access to health and obstruction of career development. He claimed that these actions and abuse of authority were the result of racial discrimination and explicitly cited article 261 of the Swiss Criminal Code, and the Convention.[5] In a ruling of 27 May 2011 the Cantonal Court upheld the prosecutor's order on the grounds that the complaint for damage to property was time-

[4] The course is compulsory for all holders of an "F" (temporary admission) permit, whether newly arrived or not.

[5] In his appeal, the author states: "These actions and abuse of authority are the result of racial discrimination. The fact that I hold an 'F' permit, which itself derives from my national origin and my reasons for being in Switzerland, puts me in a category to which the law on racial discrimination and respect for privacy and private life appear not to apply."

barred and that the other matters did not relate to criminal offences, given the powers of action and decision legally vested in the Migrant Reception Office. In particular, the Court found that, under the Cantonal Act on Assistance to Asylum Seekers and Other Categories of Foreign Nationals of 7 March 2006, the Migrant Reception Office was required to ensure that the use to which the premises it made available, were put complied with the law on land use and construction, and also with the decision on accommodation, and that, to that end, it was authorized to carry out checks; moreover, unannounced visits to premises were allowed.

2.17 On 8 August 2011 the petitioner brought a criminal appeal in the Federal Supreme Court, repeating his complaints against the Migrant Reception Office and claiming racial discrimination in his access to fundamental rights. He sought effective proceedings and a thorough investigation, a finding of violation of his fundamental rights and compensation for moral and physical damage in the amount of CHF 2,000. On 18 August 2011 the Federal Supreme Court found the appeal inadmissible as insufficiently substantiated. Among other things the Court found that, according to the law, the appeal had to be substantiated on the merits, with the appellant required to state briefly in what respect the contested decision violated the law; that the Cantonal Court had found that the Migrant Reception Office had acted in accordance with its mandate insofar as the law authorized it to carry out checks and make unannounced visits to premises; that the applicant had provided no arguments on that ground; that the petitioner had cited provisions granting particular rights to persons with refugee status; that those provisions (like those of the International Convention on the Elimination of All Forms of Racial Discrimination, which the petitioner had not cited at the cantonal level) were without relevance to the application of criminal law; and that the petitioner could avail himself of administrative remedies to contest the decisions taken against him.

The complaint

3. In the petitioner's view, the State party authorities categorize persons seeking refugee status with reference to their background, their political and religious beliefs, their intellectual ability and any future plans they may have. The decisions and attitudes of the authorities with power to control his access to the labour market, medical treatment and training, to interfere in his private life and even to discredit him with any other body, are directly related to his origins, his integrity, his background and his personality. The petitioner deplores the fact that his treatment is not the same as the treatment given to the rest of the population, and also that, notwithstanding his many complaints to various institutions, there has been no enquiry into the action taken against him by the authorities. The petitioner therefore argues that the authorities' behaviour towards him constitutes a violation by the State party of articles 1 (para. 1), 2 (para. 2), 4 (subpara. (c)), 5 (subparas. (a), (b) and (d) (i) and (iii) to (v)), 6 and 7 of the Convention.

State party's observations on admissibility and merits

4.1 On 31 August 2012, the State party submitted its observations on the admissibility and merits of the communication. It states that the petitioner applied for asylum in Switzerland on 11 August 1997. The application was rejected by the Federal Office for Refugees on the grounds that the petitioner did not meet the definition of refugee under article 3 of the Federal Asylum Act. The Federal Office for Refugees found that the principle of non-refoulement did not apply in his case and that there was no reason to believe that he ran any risk if he returned to his country. Nevertheless, following a review of all the circumstances, it was felt that it would not be reasonable to enforce the decision to return him to Somalia or a third State. On 5 January 1999, therefore, the Federal Office for Refugees granted him temporary admission. The petitioner appealed the decision and the

appeal was turned down on 18 February 1999 by the Swiss Asylum Appeals Commission (later replaced by the Federal Administrative Court).

4.2 Temporary admission is not a residence permit but an alternative measure to expulsion. The rights and obligations of persons admitted on a temporary basis are governed by the legal provisions relating to foreign nationals and the relevant ordinances. Since 1 January 2008 persons admitted on a temporary basis have had access to the labour market.[6] Temporary admission and the granting and extension of temporary admission status fall under the competence of the canton of residence. Labour market access, welfare, restrictions on the choice of medical care providers, and housing are administered by the competent cantonal authority.

4.3 In the canton of Vaud, where the petitioner lives, persons with temporary admission status are treated as asylum seekers (Cantonal Act on Assistance to Asylum Seekers and Other Categories of Foreign Nationals, art. 3). Subsequent issue of a residence permit is governed by the provisions of the Foreign Nationals Act. The conversion of temporary admission to residence permit falls under cantonal jurisdiction and depends on various criteria of integration — e.g., length of stay, social integration and financial independence — and the individual's family situation. An application for a residence permit may be submitted by a foreign national admitted on a temporary basis who has been resident in Switzerland for at least five years.

Admissibility

4.4 Referring to article 1, paragraph 2, of the Convention, the State party recalls that its authorities may treat their own nationals and non-nationals differently, provided that this distinction is not discriminatory in purpose, on grounds of race, colour, descent or national or ethnic origin, and does not entail such consequences. The petitioner's claims are based solely on his status under the law on foreign nationals and not on his origin or his Somali nationality. The regulations challenged here do not apply only to Somali nationals or a specific group of persons within the meaning of article 1 of the Convention.

4.5 The question of whether, given the restrictions associated with temporary admission status (notably where longer stays are concerned), the status of persons admitted on a temporary basis to Switzerland may entail their exclusion to the extent that they can be defined as a group protected by the prohibition of discrimination was considered in a study in 2003 by the Institute of Public Law of the University of Berne, at the request of the Federal Commission against Racism.[7] According to this study, a group defined by residence status is not one of those protected by the prohibition on discrimination. Temporary admission is a legal status. No particular link with the individuals concerned and their personal situation, such as that required to demonstrate discrimination, is inherent in this legal status. The report nevertheless acknowledges that a series of restrictions in essential areas of life may entail exclusion for those affected but that that exclusion does not constitute discrimination, even indirect discrimination.

4.6 As regards exhaustion of domestic remedies, the State party points out that anyone may allege a violation of article 8, paragraph 2, of the Swiss Constitution, prohibiting racial discrimination, in the Swiss courts. The petitioner did not do this, and yet he could have done, since this is a public law remedy open to anyone who claims discrimination on

[6] See article 85, paragraph 6, of the Foreign Nationals Act, whereby the cantonal authorities may grant temporarily admitted persons a work permit irrespective of the job market or the general economic situation.

[7] R. Kiener and A. Rieder, *Temporary admission from the standpoint of fundamental rights*, Berne, Federal Commission against Racism, 2003.

grounds of membership of a group protected by that provision of the Constitution. A violation of fundamental rights guaranteed under the Constitution or an international convention may also be taken up in the civil or criminal law remedies available at the cantonal and federal levels. In Swiss law, an alleged conflict between the application of domestic law and human rights guarantees under the Constitution or a convention may in principle always be raised by means of the remedies provided to challenge the particular decisions taken.

4.7 The petitioner took various proceedings through various channels. Two of them went to the Federal Supreme Court: the one regarding the conversion of his temporary admission to a residence permit (Federal Administrative Court ruling of 14 May 2007), and the one regarding his criminal case against the Migrant Reception Office of the Canton of Vaud, which the Federal Administrative Court ruled inadmissible on 18 August 2011. In the first appeal, the petitioner certainly cited one or more reports by the Federal Commission against Racism but did not allege a violation of the Convention. In any case, the requirement under rule 91 (f) of the Committee's rules of procedure, for any communication to be submitted to the Committee within six months of exhaustion of domestic remedies, was not met.

4.8 As regards the various restrictions surrounding temporary admission, there too the petitioner has failed to exhaust domestic remedies. He alleged a violation of his right to privacy and inadequate access to medical care. These complaints were raised in the Federal Supreme Court as arguments against the dismissal of the petitioner's criminal complaint against the Vaud Migrant Reception Office. In its decision of 18 August 2011, the Court nevertheless found the appeal inadmissible as insufficiently substantiated under article 42, paragraph 2, of the Act on the Federal Supreme Court, as the petitioner presented no arguments regarding the grounds for rejection at the cantonal level. The cantonal decision had found that the criminal complaint was time-barred and that the Migrant Reception Office had acted in accordance with its mandate in carrying out checks and unannounced visits to premises. In respect of the complaint of racial discrimination, the Federal Supreme Court found that it had not been raised at the cantonal level and the Court was therefore not entitled to consider the application of the Convention, as it had not been invoked in the manner required by the law. The State party points out that the Cantonal Act on Assistance to Asylum Seekers and Other Categories of Foreign Nationals clearly sets out the remedies available against decisions by the Migrant Reception Office.[8] Yet the petitioner did not challenge the Centre's decisions with regard to housing, medical treatment or welfare using the remedies described in the Act. He challenged only one welfare payment.

4.9 As regards his admission to the University of Lausanne, the petitioner did not appeal the decision not to admit him. As to access to employment, there was nothing to prevent the petitioner from looking for work and being hired. With regard to the denial of authorization to travel to visit his sick mother in 2008, the appeal lodged by the petitioner was taken off the Federal Administrative Court register on 5 March 2008 when the appeal was withdrawn. In any case that appeal does not appear to contain any reference to racial discrimination. Here again the six-month deadline for submitting a communication to the Committee was not observed. In 2010 the conditions governing travel documents for foreigners were relaxed and the petitioner has had the right to obtain a travel document since April 2010 and leave and return to Switzerland. As to his efforts to obtain a travel document to study abroad in 2011, the file shows that he did not complete his application correctly, conflating a request for a travel document with a request for a residence permit.

[8] These remedies are governed by articles 72 and 73 of the Cantonal Act.

4.10 The State party finds that the petitioner has not, or has not properly, exhausted domestic remedies designed to protect his fundamental rights. The domestic courts have not had an opportunity to consider whether or not there was discrimination within the meaning of article 8, paragraph 2, of the Constitution, or within the meaning of the Convention, with respect to foreign nationals' status in law.

Merits

4.11 The State party notes that the petitioner's status does not depend on his national origin. His status, and the disadvantages associated with it, can be changed if he meets the personal criteria for obtaining a residence permit. Moreover, the author has not demonstrated that his national origin is an impediment to his obtaining a residence permit. The fact that he has not obtained a residence permit derives from his personal situation and not his national origin or his race. In its ruling of 22 February 2007, the Administrative Tribunal of the Canton of Vaud found that the petitioner had not shown that he could support himself in a sustainable fashion (he was wholly supported by the canton of Vaud) even though he could have entered gainful employment. These arguments do not appear to be without foundation given the State party's competence to regulate immigration. Controlling immigration is not against the Convention and would be a violation only if the measures used actually concealed racial discrimination.

4.12 The petitioner claims that he was unable to work but complains that he was required to inform the Employment Office whenever he obtained work. In fact, under article 85, paragraph 6, of the Foreign Nationals Act, anyone admitted on a temporary basis may enter gainful employment subject to authorization. In the canton of Vaud, since at least 2000, in the authorization procedure the authorities do no more than look at the conditions of employment. Thus, contrary to the petitioner's claim, there was and is nothing to stop him looking for work. The State party adds that, since the Foreign Nationals Act entered into force on 1 January 2008, persons admitted on a temporary basis have unlimited access to the Swiss labour market and have been declared a target group in the encouragement of integration. In light of the foregoing, the State party considers the petitioner's claim in respect of access to employment to be unfounded. Furthermore, this position is underpinned by the State party's reservation to article 2, paragraph 1, of the Convention.

4.13 As to access to university education and the right to freedom of movement throughout the country, the State party notes that there is no written trace of any application by the petitioner for admission to the University of Lausanne for the year 2000. He may have obtained information verbally but no written application seems to have been made. In 2008 the author sought admission on the basis of application to the Social and Political Sciences faculty at the University of Lausanne. His request was turned down on 26 March 2008 as it did not meet the criteria under article 85 of the Regulations to the Act of 6 July 2004 on the University of Lausanne.[9] In its letter of rejection, the Matriculation and

[9] Article 85. Administrative requirements

An application for admission may be submitted by: Swiss nationals, Lichtenstein nationals, foreigners resident in Switzerland ("C" permit), other foreigners resident in Switzerland and who have held a Swiss work permit for at least three years, and political refugees, provided that they meet the following supplementary requirements:

(a) Professional or upper secondary qualification;

(b) Equivalent of three years' full-time post-qualification employment;

(c) A duly constituted and submitted application;

(d) Successful completion of the various stages of the admission procedure;

(e) Completion of the administrative formalities for matriculation.

Registration Office informed him that he could register for an entrance examination and advised him to find out about the requirements for taking the examination. The petitioner did not heed this advice and simply turned up at the University thinking that he could take the examination without going through the formalities established in the Regulations. Even though his situation had not changed, he submitted another application in 2009 and was therefore rejected again under article 85 of the Regulations. According to the university files, no application was submitted in 2010. His application in 2011 was turned down for the same reasons as before. On 3 March 2011, he asked the University of Lausanne to inform him of the remedies available and the University did so in a letter of 8 March 2011. The petitioner did not make use of those remedies. The State party points out that, while the Regulations preclude the matriculation of persons admitted to Switzerland temporarily, it is not for reasons of race but because their status in Switzerland is uncertain as their asylum application has been turned down and they are only in the country because return is not yet possible. The State party points out that the Committee's case law holds that restricted access to universities (by persons who do not have a permanent residence permit, for example) is compatible with the Convention.[10]

4.14 With regard to access to treatment and health insurance, the State party notes that the right to obtain assistance in emergencies under article 12 of the Constitution entails, among other things, a right of access to basic medical care that must be the same for all, without discrimination of any kind. This is a social right that is directly justiciable in the courts. Compulsory health insurance for persons admitted on a temporary basis is governed by the Federal Asylum Act and the Federal Act of 18 March 1994 on Health Insurance. In this case, the petitioner had to go urgently to the Stomatology and Dental Care Service on 14 January 2008 to have a tooth treated. The invoices for treatment were sent to the Migrant Reception Office of the Canton of Vaud, which settled them. As to the estimate for dental treatment prepared for the petitioner by a dentist, the Migrant Reception Office requested a breakdown of the estimate and, after verification, provided a payment guarantee. The authorities of the State party can thus not be accused of failing to guarantee the petitioner's access to health.

4.15 The State party notes that, according to the petitioner, the housing inspections under article 32 of the Cantonal Act on Assistance to Asylum Seekers and Other Categories of Foreign Nationals are a violation of his right to respect for the home, and discriminatory. The petitioner occupies accommodation provided by the Migrant Reception Office and, under article 81 of the Federal Asylum Act and articles 28 ff. of the Cantonal Act on Assistance to Asylum Seekers, that Office may obtain entry to a dwelling under certain conditions relating to the general interest and maintaining a due sense of proportion. As it happens, between 2009 and the time of writing of the State party's observations, the Office has had to enter the petitioner's dwelling on only two occasions, which cannot be considered disproportionate. The Office's maintenance service needed to go in first in order to carry out a health check of the premises and on the second occasion, in January 2011, in order to take some measurements. Prior written notification was given of both of the inspections, and no objection was made to the decisions. The State party has no knowledge of any incident regarding the petitioner's letterbox. In any event, the checks carried out in this instance are not indicative of any discrimination on the grounds of race, colour, descent or national or ethnic origin.

4.16 With regard to social assistance, the author is completely supported by the Migrant Reception Office. In accordance with the relevant legal provisions, he is granted the sum of

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Applications from candidates meeting these administrative requirements shall be forwarded to the relevant faculty by the Board of the University.

[10] See communication No. 42/2008, *D.R. v. Australia*, opinion adopted on 14 August 2009, para. 7.2.

CHF 12.50 daily, the same amount paid to everyone in his situation. An appeal may be lodged in respect of this benefit, to the Director of the Office and within 10 days of the notification of granting of assistance, in accordance with article 72 of the Cantonal Act on Assistance to Asylum Seekers and article 6 of the Social Welfare Guide of the Canton of Vaud. In this case the petitioner has never objected to these decisions by challenging the amount granted; he has only challenged amounts withheld when, in one case, he had failed to comply with the notice requiring him to attend courses at which attendance was compulsory and, in the other, he had earned some income by giving French lessons. His appeal in respect of the latter is pending with the Chief of the Finance Department of the Canton.

4.17 As to the complaint under article 6 of the Convention, and as mentioned above, the State party considers that the petitioner has not, or has not properly, exhausted all remedies, which means that the question of whether there has been discrimination has not been considered by the courts. What is relevant from the standpoint of article 6 is that the Swiss legal system provides effective protection against true discrimination (provided there is a defensible claim). Swiss case law, which is broad in scope, shows that that protection is effective and genuine.

Petitioner's comments on the State party's observations on admissibility and merits

5.1 On 6 November 2012 the petitioner submitted comments. He complains that temporary admission is a system designed to deter foreigners from remaining on Swiss territory. Temporary admission status has no time limit and people might live in Switzerland with that status for 20 or 30 years. Persons admitted on a temporary basis are set apart by the regime associated with this status, which applies in every area of daily life, and by their physical appearance, their language and their national and cultural origin. In his view the notion of origin and nationality cannot be separated from the status of temporary admission. The ban on racial discrimination within the meaning of article 1 of the Convention has not been faithfully incorporated into Swiss law and therefore does not guarantee protection in line with international standards. Switzerland has three distinct groups, based on nationality: (1) Swiss; (2) Europeans and American, Canadian, Australian and New Zealand citizens; and (3) nationals of third countries. A person with temporary admission status can only belong to the third category.

5.2 The petitioner describes comments made by officials of the Federal Office for Migration, some of them on the radio, to the effect that persons with temporary admission status are welfare cases. He maintains that these comments are a violation of article 4 of the Convention. He describes the attitude of the migration services in their handling of cases, an attitude that he maintains has never been penalized by the State party's courts. He therefore asks the Committee not to concentrate on specific claims but rather to make an overall analysis and try to establish to what extent the social, economic and cultural context in Switzerland is a factor in discrimination against particular groups of the foreign population, whether in respect of civil and political rights or economic, social and cultural rights.

5.3 The petitioner notes that the State party has itself acknowledged that there is exclusion of persons who have been legally settled on its territory for a certain length of time. An analysis should therefore be made of the identity of those who make up the group of persons admitted on a temporary basis. The State party sees temporary admission as a highly strategic status. According to the petitioner, it does not deny racial discrimination but justifies it on the grounds that it has the right to pass laws discriminating against or excluding particular persons or groups within the foreign population under its jurisdiction.

The petitioner recalls the Committee's general recommendation No. 22 (1996), on article 5 and refugees and displaced persons,[11] whereby the State party has a positive obligation to take a series of measures, notably economic and social measures, to protect individuals and ensure the effective realization of their fundamental rights.

5.4 According to the petitioner, holders of an "F" permit are subject to arbitrary decisions by the State party's administrative authorities. Every Swiss institution must inform the migration services of any procedures undertaken by members of this group. That includes schools, regional employment offices, unemployment benefit offices, doctors, banks and the Post Office. This is a dehumanizing practice. This intrusive behaviour by the migration services, and all discriminatory practices by migration officials, go unpunished. In fact, since no justification is given for the decisions taken by the migration services, any recourse against them is ineffective, particularly as the courts themselves recognize the competence of these services in this regard. The petitioner refers to a legal opinion published in a report of the Federal Commission against Racism to the effect that not only do the migration services decide whether, and under what circumstances, to consider hardship cases (temporary admission), but that they have a free hand, at least for decisions at the cantonal level, in interpreting and weighing the criteria. The decision-making process is thus also a political process.[12] This legal opinion goes on to point out that this situation is problematic because those who are victims of discriminatory application of the law by the authorities cannot appeal.

5.5 On these grounds the petitioner criticizes the system of issuing a residence permit to these individuals while keeping them under close supervision, controlling their access to all rights, including the right to work. Supervision in his case included weekly calls to the employer he worked for between May 2000 and September 2002 to find out how he was working.

5.6 The differences in the treatment of foreigners are blatant, with rejected asylum seekers receiving emergency aid of CHF 8 to CHF 10 per day, temporary admissions receiving aid of CHF 12.50 per day and other categories of foreigners and Swiss requiring social assistance receiving around CHF 40 per day (CHF 1,200 per month). The petitioner has tried to contest the amount paid but to no avail – in his view because there are no remedies. The payslip states that the recipient may contest the payment but this refers to the right to challenge an error in the payment, not to contest the amount of social assistance as such. In addition, persons on temporary admission may not freely choose their doctor (Cantonal Act on Assistance to Asylum Seekers and Other Categories of Foreign Nationals, art. 37, para. 2). A person can receive no treatment apart from emergency treatment without a payment guarantee issued by the Migrant Reception Office. In his case the Office did not accept the dentist's estimate and his tooth became infected.

5.7 As regards the violation of privacy, the petitioner rejects the State party's explanations and says that the Migrant Reception Office did not give him advance notice of the official's visit but left a note afterwards saying they had called. The petitioner tried to obtain explanations and lodge an appeal, to no avail.

5.8 The petitioner considers that the "F" permit is not a reliable, unambiguous document that allows him to move freely within the Schengen area in Europe. Although in theory that possibility is open to him, in practice the other European States interpret the document

[11] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 18* (A/51/18), annex VIII, sect. C.

[12] S. Bolz, "Cas de rigueur dans le domaine de l'asile – les mêmes chances pour tous?" Report of the Federal Commission against Racism, TANGRAM No. 24, November 2009, p. 76. Available from www.ekr.admin.ch/pdf/Tangram_24.pdf (accessed 26 February 2014).

differently, as it states that permit holders may not cross the Swiss border and, if they do so, may not return to Switzerland.

5.9 As regards access to employment, contrary to the assertions by the State party, the obligation is not only to report any new job. The employer has to request authorization using form 1350 and await a reply before hiring the person, which is enough to deter employers from hiring the person. This is clearly indicated in the certificates issued by the Population Service of the Canton of Vaud. A report by the Swiss Refugee Council, of 1 April 2008 — i.e., after the entry into force of the new Foreign Nationals Act — states that these people live for many years in a situation that is limited in time and are involuntarily dependent on welfare because permission to work is still granted at the authorities' discretion and many employers believe that persons admitted on a temporary basis will only be staying in Switzerland temporarily.[13] The employer needs authorization from the authorities and the authorities need a work contract in order to grant authorization. The aim is thus to deter people from working.

5.10 As to the remedies attempted, the petitioner states that his first appeal against the Population Service of the Canton of Vaud (Asylum Division, Lausanne) was rejected by a decision of 18 November 2003. His application for a review of that decision was rejected by the Plenary of the Administrative Tribunal on 19 May 2004, without leave to apply to the Federal Supreme Court. His second appeal against the Vaud Population Service was rejected (in this case he was not represented by a lawyer), with leave to appeal to the Federal Supreme Court. Unfortunately, his lawyer did not submit the brief in time and the Supreme Court found the appeal inadmissible. On 21 May 2010 the petitioner lodged a complaint against the Migrant Reception Office with the public prosecutor for breaking into his home. This complaint was rejected by an order dated 4 June 2010. On 25 June 2010 the petitioner lodged a further complaint with the justice of the peace in respect of the actions of Migrant Reception Office officials.[14] This application was rejected on the grounds that the time limits had not been observed.

5.11 When the justice of the peace dismissed the case, the petitioner went to the police to report the intrusion into his home and the violation of his private correspondence. On 12 January 2011 a police inspector told the petitioner that the case would not be put to the prosecutor since the actions did not constitute a criminal offence; however he could bring it before the prosecutor himself. Accordingly, in a letter dated 17 January 2011, the petitioner lodged a complaint,[15] and this was rejected by an order of 2 May 2011.[16] The petitioner had 10 days to appeal this decision, and did so. In this appeal he referred directly to the Convention and claimed racial discrimination. In a decision of 11 July 2011, the Criminal Appeals Chamber of the Cantonal Court rejected the appeal on the grounds that the petitioner had not used the correct remedies or observed the time limits in respect of the actions of Migrant Reception Office officials regarding his access to social assistance and medical treatment. As to the violation of his home, the court agreed that the actions did not constitute an offence. The petitioner's appeal against this decision was rejected by the

[13] Swiss Refugee Council (OSAR), *La Suisse terre d'asile*, 1 April 2008.

[14] This letter does not allege racial discrimination but complains of the actions taken by migration officials in order to exclude him or put him at risk.

[15] The complaint concerned not only the violation of his place of residence but also the actions of Migrant Reception Office officials with regard to the choice of social worker assigned to handle his case, and freedom of access to all medical treatment. This appeal alleges racial discrimination and cites the provisions of the Convention and article 261 bis of the Swiss Criminal Code, on racial discrimination.

[16] The prosecutor found that the Migrant Reception Office staff had carried out tasks that were part of their job description and were not unlawful.

Federal Supreme Court on 18 August 2011 on the grounds that no offence had been committed. In the author's view, if racial discrimination had been adequately incorporated into Swiss law, arbitrary actions of that kind would constitute racial discrimination.

5.12 The petitioner also impugns the Migrant Reception Office of the Canton of Vaud for having compelled him to take training courses designed for newcomers. Failure to attend entailed withholding part of the emergency aid grant. On those grounds and referring to the earlier complaints, he accused the Director of the Migrant Reception Office of abuse of authority, racial discrimination and violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The public prosecutor rejected this application on 23 February 2012, finding that the Migrant Reception Office had not opposed the petitioner's attempts to find work and that there had been no harassment by mail nor violation of his home or his right to health. On 9 March 2012 the petitioner lodged an appeal with the Cantonal Court alleging, among other things, racial discrimination under article 261 bis of the Swiss Criminal Code. On 14 June 2012 the Criminal Appeals Chamber of the Cantonal Court rejected the appeal on the grounds that the absence from courses the petitioner had been invited to attend could not derive from any criminal offence. The defence of the petitioner's interests did not therefore require the appointment of legal counsel.

Further information from the State party

6. On 25 January 2013, the State party informed the Committee that it would not be presenting further observations. In its view, the petitioner's comments confirm that this is not a case of racial discrimination within the meaning of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, whether or not the communication is admissible.

7.2 The Committee notes that the State party has challenged the admissibility of the complaint on the grounds that domestic remedies had not been exhausted, the six-month time bar had been exceeded in respect of some remedies and that the author's complaints were based solely on his status under the law on foreign nationals and not on his origin or nationality.

7.3 The Committee considers that the question of admissibility raises issues of fact and of law that are closely bound up with the merits of the communication and accordingly decides to consider admissibility and the merits together.

Consideration on the merits

8.1 Acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee has considered the communication in light of all the information submitted to it by the petitioner and the State party.

8.2 The Committee observes at the outset that it must determine whether an act of racial discrimination as defined in article 1 of the Convention has occurred before it can decide

which, if any, substantive obligations in the Convention to prevent, protect against and remedy such acts, have been breached by the State party.[17]

8.3 According to the petitioner, his temporary admission status and the decisions and attitudes adopted by the authorities in accordance with that status make it possible for them not only to regulate his access to the labour market, medical treatment and academic and vocational training, and to interfere in his private life, but also to discredit him with any institution. For the petitioner, these decisions, which give the decision makers a good deal of room for manoeuvre, are in practice directly related to his origins, his integrity, his background and his personality. The Committee notes that the petitioner's claims have been abundantly supported by specific examples of decisions the author considers to be discriminatory against him. The Committee notes in particular the petitioner's claims regarding obstacles to access to work, to vocational and university training and to health.

8.4 The State party maintains that the petitioner's complaints are based solely on his status under the law on foreign nationals and not on his origin or his Somali nationality; that the regulations challenged here do not apply only to Somali nationals or a specific group of individuals within the meaning of article 1 of the Convention. The Committee notes that, according to the State party, temporary admission is a legal status and no particular link with the individual and his or her personal situation, such as that required to demonstrate discrimination, is inherent in this legal status.

8.5 The Committee recalls that article 1 of the Convention defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The Committee also recalls article 1, paragraph 2, which states that the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens; as well as paragraph 3 of the same article, which provides that nothing in the Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

8.6 The Committee underlines the complexity of the issue raised by this case, which highlights the negative effects of the Swiss "temporary admission" status ("F" permit for foreigners) on some groups of foreigners who can also be distinguished by ethnic or national origin. Nevertheless, the Committee considers that the petitioner in this case has not unequivocally established that the discriminatory acts he attributes to the Migrant Reception Office of the Canton of Vaud and to the judicial authorities were based on his ethnic origin or Somali nationality and not on his status as a foreigner admitted on a temporary basis as provided by Swiss law. The Committee is therefore not convinced that the facts before it constitute discrimination based "on race, colour, descent, or national or ethnic origin" within the meaning of article 1 of the Convention.

8.7 Having reached that conclusion, the Committee will not consider the petitioner's claims under the other provisions of the Convention.

9. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of any of the provisions of the Convention.

[17] See communication No. 31/2003, *L.R. et al. v. Slovakia*, opinion adopted on 7 March 2005, para. 10.2.

10. Notwithstanding the conclusion it has reached in this case, the Committee notes that the State party has itself acknowledged the adverse consequences of temporary admission status on essential areas of life for this category of non-nationals, some of whom find themselves permanently in a situation that ought to be temporary. The Committee therefore draws the attention of the State party to its obligations under the Convention and refers to its general recommendation No. 30 (2004) on discrimination against non-citizens in which, among other things, it recalls States parties' obligation to take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.[18]

11. Accordingly, the Committee recommends that the State party review the regulations governing its temporary admission regime, with a view to limiting as far as possible the restrictions on the enjoyment and exercise of fundamental rights and in particular rights relating to freedom of movement, particularly when that regime is applied for a long period.

[Adopted in English, French, Russian and Spanish, the French text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

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[18] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 18* (A/59/18), chap. VIII, para. 33.